(1)
ct, U.S.
D
95-290 AUG 2 1 1995
No. ____
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

GILBERT ROSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

VIVIAN SHEVITZ*
CAROL E. GETTE
DONAL A. MEYERS
19 N. Moger Avenue
Mt. Kisco, N.Y. 10549
(914) 241-1249

Counsel for Petitioner

**Counsel of Record*

118 1818

QUESTIONS PRESENTED

Gilbert Ross, a medical doctor with an unblemished record and no experience with Medicaid billing, answered a New York Times ad for a physician to work at a busy Bronx medical clinic. With *conceded* innocent intent and no knowledge of anything wrong, he began to supervise credentialed physician's assistants (PAs) who performed patient examinations at the clinic, first ascertaining from the State Medical Society that such supervision (reviewing charts) was permissible.

Unbeknownst to Dr. Ross, the PA's and clinic owner Khan were in on a "game" called "playing the docs", in which Medicaid recipients feign illnesses to obtain non-controlled prescriptions (such as asthma or high-cholesterol medication) to sell "on the street"-- a practice that

petitioner had no idea existed. PAs created phony charts to "fool Medicaid" and, as one testified, to "fool the docs" who were needed so that Medicaid could be billed: doctors lured to the clinic would bill for patient visits and then paid rent for the offices, services, and staff. In return for providing pills, Khan demanded that all "patients" give blood, which was sent to a laboratory in which Khan owned an interest (but petitioner did not know). The indictment charged intentional participation in the "blood for pills" scheme, where no patients were "real" and thus nothing billed to Medicaid was for anything "medically necessary".

Petitioner stayed at the clinic only seven weeks and resigned on finding out about Khan's "connection" to the lab.

Despite H.J.Inc.[1]--that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [RICO's pattern] requirement"--the Court of Appeals affirmed the RICO conviction because the enterprise, not Dr. Ross's conduct, had been "ongoing".

Further, though petitioner's conduct at the clinic facially evidenced good faith--including documented notations on patient records and directives about prescriptions appropriate for conditions and to have patients return--the Court affirmed underlying mail fraud convictions on the prosecutor's *argument* that, because *others* had discerned at least some aspect of the fraud, petitioner "should have known" and so must have known. Without

---

[1]*H.J.Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).

pointing to any evidence showing that petitioner--concededly *without* knowledge at the beginning--had discerned "the fraud", petitioner's good-faith conduct (including the fact that he resigned the lucrative position after seven weeks) was deemed conduct designed solely to "cover his tracks". The Court affirmed "conscious avoidance" based on evidence that Dr. Ross had "done nothing".

The Court did not discuss the fact that the "conscious avoidance" instruction did not even identify for the jury what "fact" was supposedly avoided, instead referring only to the defendants' awareness of a high probability that "the representations charged in the indictment were fraudulent". The Court also held that, though the instruction also omitted

the "balancing language" (*i.e.* what the defendant actually believed) deemed crucial in "conscious avoidance" cases to prevent conviction on a "should have known" theory, the deficient instruction was not "plain error" even though the prosecution had requested the language.

The Court of Appeals also did not discuss the first-impression issue of the (mis)use of the All Writs Act to freeze all of petitioner's assets from the moment of conviction until now. Though after trial, petitioner moved to free his assets beyond the $40,000 forfeiture sum (there was no longer a basis for the pre-trial restraining order), the court, instead of releasing funds for expenses including counsel fees for sentencing and appeal, used the All Writs Act to impose a

continued restraint on all assets "pending restitution" (neither ordered nor considered at the time) and then rejected the notion that the defendant had a Sixth Amendment right to use his own funds to pay counsel that must be considered before "full" restitution was ordered.

The questions presented are:

1. whether a conviction premised on conscious avoidance is consistent with the Constitutional requirement that all elements of a crime, including knowledge, be proven beyond a reasonable doubt;

2. whether, if a conscious avoidance instruction is ever permissible, a jury instruction that lacks the "balancing language" deemed crucial to prevent conviction based on an objective ("should have known") standard can ever be (or in

this case was) an error not going "to the very essence of the case";

3. whether, as some Circuits have required, there must be evidence of a defendants "conscious purpose" to avoid knowledge and whether the evidence warranted a conscious avoidance instruction here;

4. whether the conviction here, based on arguments and evidence of what others "knew or should have known", is consistent with the high standard of proof beyond a reasonable doubt;

5. whether a defendant whose arguable misconduct lasted only seven weeks can be guilty under RICO of committing a "pattern of racketeering activity" on the basis that the "enterprise" with which he was "associated" but left, is "ongoing";

6. whether, to the extent that RICO's "pattern" element allows conviction for the conduct at issue here, RICO is unconstitutionally vague;

7. whether the unprecedented use of the All Writs Act to restrain all assets of a criminal defendant solely to "secure restitution" is a legal use of the Act;

8. whether a court, consistent with the Sixth Amendment and Due Process clause, can properly deny a defendant the use of his funds to pay counsel fees and other expenses of defense and order the funds used for restitution instead; and

9. whether the standard of review by the Court of Appeals was consistent with Jackson v. Virginia, 443 U.S. 307 (1979).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Prosecutor, United States of America; Defendants-Appellants Mohammed Sohail Khan, Jacqueline Otero, Deborah Williams, Rosaly Saba Khalil, Lancaster Lo, and Gilbert Ross. Non-appealing defendants included Jamshaid Khan, Charles Addo Yobo, Audrey Cicile Sadaphal, Nephtali Montfort, and Parnell St. Louis.

We understand that co-defendant-appellant Deborah Williams will be filing a petition for certiorari, and hereby rely on arguments made therein.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES xii

OPINION BELOW 1

JURISDICTION 1

PERTINENT STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

The Conscious Avoidance Instruction 24

RICO 27

Restraint of Petitioner's Assets . . 29

REASONS FOR GRANTING THE WRIT 34

I. Given The Proliferation of "Conscious Avoidance" Cases, The Laxness with which the Concept is Applied, The Lack of Guidance By This Court, The Conflict In Circuits, And The Recognized Risk Of Unfair Convictions, The Court Should Grant *Certiorari* To Consider The Constitutionality of Conscious Avoidance Convictions *Vel Non*, And If Constitutional, The Evidentiary Showing Necessary To Invoke the Concept and Instructions Required To Prevent Convictions Premised On Negligence. . 34

II. The Court Should Grant The Writ To Enforce The High Standard Of Proof Necessary For A Criminal Conviction As Expressed *Jackson v. Virginia*, 443 U.S. 30. (1979) 49

III. The Writ Should Be Granted To Make Clear That RICO Does Not Apply To People Whose Conduct Is Limited, Based Only On The Conduct Of Others; If RICO *Can* Be So Applied, The Court should Hold RICO Impermissibly Vague and Unconstitutional 56

IV. The Writ Should Be Granted To Prevent The Limitless Use Of The All Writs Act To "Secure Restitution" And To Prevent A Defendant From Using His Own Funds For His Defense 59

V. Petitioner Joins In Co-Appellant Williams' Relevant Claims . . . 64

CONCLUSION 65

APPENDICES:

APPENDIX A: Order and Decision appealed from 1a

APPENDIX B: Order Denying Rehearing and Rehearing en banc 36a

APPENDIX C: Pertinent Statutes . . 59a

TABLE OF AUTHORITIES

Page

Cases:

Caplin & Drysdale, Chartered
v. United States,
491 U.S. 617 (1989) 62

H.J.Inc. v. Northwestern Bell Tel. Co.,
492 U.S. 229 (1989) iii, 28, 57, 59

In re Winship, 397 U.S. 358 (1970) . 35, 50

Jackson v. Virginia,
443 U.S. 307 (1979) 49

Kotteakos v. United States,
328 U.S. 750 (1946) 3

Leary v. United States,
395 U.S. 6 (1969) 37

New York State Clinical Laboratory
Association, Inc. v. Kaladjian,
194 A.D.2d 189, 605 N.Y.S.2d 499
(3d Dept. 1993) 6

Reves v. Ernst & Young, __ U.S. ___,
113 S.Ct. 1163 (1993) 57

Spurr v. United States,
174 U.S. 728 (1899) 36

Tomala v. United States,
504 U.S. 932 (1992) 48

United States v Eaglin, 571 F.2d 1069 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978) 47

United States v. Marchand, 564 F.2d 983 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978) . . 17

United States v. Aleman, 728 F.2d 492 (11th Cir. 1984) . 47

United States v. Batencort, 592 F.2d 916 (5th Cir. 1979) . . 47

United States v. Bright, 517 F.2d 584 (2d Cir. 1975) . . 45

United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991) . 47

United States v. Esquer-Gamez, 550 F.2d 1231 (9th Cir. 1977) . 41

United States v. Ferroz, 848 F.2d 359 (2d Cir. 1988) . . 45

United States v. Jewell, 532 F.2d 697 (9th Cir.)(en banc), cert. denied, 426 U.S. 951 (1976) 38, 46

United States v. Marietta-Bejarano, 552 F.2d 1323 (9th Cir. 1977) . 46

United States v. Rodriguez, 983 F.2d 455 (2d Cir. 1993) . . 26

United States v. Sanchez-Robles, 927 F.2d 1070 (9th Cir. 1991) . 47

United States v. Valle-Valdez,
554 F.2d 911 (9th Cir. 1977) . . 41

Victor v. Nebraska, ___ U.S. ___,
114 S.Ct. 1239 ((1994) 51

Walters v. Nat'l Assoc. of
Radiation Survivors,
473 U.S. 305 (1985) 62

Statutes or Rules:

18 U.S.C. §1651 (All Writs Act) . . 2, 31

18 U.S.C. §1961 *et seq.* 2

18 U.S.C. § 1963(d)(1) 29

18 U.S.C. §3664(a) 32

18 U.S.C. §982(b)(1) 29

Other Authorities:

Ira Robbins, The Ostrich Instruction:
Deliberate Ignorance As A Criminal
Mens Rea, 81 Jrnl. Crim. L. &
Criminology 191 (1990) 34

Jon O. Newman, Beyond "Reasonable Doubt",
68 N.Y.U.L.Rev. 979 (1993) . . . 51

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

No.

GILBERT ROSS,
Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The decision of the Court of Appeals affirming the conviction and remanding as to restitution is reported at 53 F.3d 507 and is reprinted in App. A at 1a-24a. The order denying rehearing is at App.B, 25a.

JURISDICTION

The Order denying rehearing was entered on

June 9, 1995 (App.B.25a). Jurisdiction is invoked under 28 U.S.C. §1254(1).

PERTINENT STATUTORY PROVISIONS

We reprint in Appendix C relevant portions of the mail fraud statute, 18 U.S.C. §1341 (26a); the RICO statute, 18 U.S.C. §1961 *et seq.* (26a-31a); the All Writs Act, 18 U.S.C. §1651 (31a); and the restitution statutes, 18 U.S.C. §§3663-3664 (31a-37a).

STATEMENT OF THE CASE

In February 1991, Gilbert Ross answered an ad in the New York Times for a doctor to work at a busy Bronx clinic. Upon interviewing with owner Khan, Dr. Ross saw an ongoing venture at which credentialed Physician's Assistants (PAs) were the patient examiners and, Khan explained, doctors supervised by reviewing their charts. Concerned about the legality

of such supervision, Dr. Ross checked with the State Medical society (as prosecution witness Khan confirmed),[2] and, after negotiating a lease with Khan, agreed to begin work after a weekend vacation.

Unlike two co-defendant doctors (the Court ignored petitioner's contention that under *Kotteakos* he should not have been tried with others, as discussed below),[3]

---

[2]Though the trial judge perplexingly deemed Khan "credible", he held that a perjury adjustment would not be supportable (though it carries a preponderance standard) on Khan's word alone.

[3]Though the four co-defendant doctors each worked at various of the four Khan clinics, there was in fact no joint venture, but rather separate ones between each doctor and Khan. All doctors worked independently; none shared with each other; Khan himself testified that each doctor was a separate partner. The Court of Appeals ignored our argument that under Kotteakos v. United States, 328 U.S. 750 (1946), the admission of evidence concerning other doctors' conduct was irreparably harmful. Prejudice mounted because the government used testimony of two other doctors (Sadaphal and Yobo) to the effect that they had discerned "the fraud" almost from "the beginning" to argue petitioner's "knowledge". Though the Court of Appeals did not discuss the serious *Kotteakos* issue, it *did* refer to what the cooperating doctors

(continued...)

petitioner visited the clinic regularly and took charts home. Except for the first batch of charts--prepared when petitioner was "getting his feet wet" in the new venture[4]--petitioner's charts showed a conscientious attempt to monitor and properly supervise his PA (Ferns).

---

[3](...continued)
testified as to their supposed discernment of "the fraud". (We say "supposed" discernment because Dr. Sadaphal, who entered into a cooperation agreement on the eve of trial, stated at her plea that she "knew" of the fraud only "in retrospect". Nor, significantly, did she ever say that she had "deduced" fraud from the way the clinics looked or equipment supposedly lacking--a factor to which the Court pointed ("utterly inadequate facilities") in affirming the sufficiency of evidence of petitioner's "knowledge" (12a). As shown in our brief below, Medicaid investigators had not found the clinic "unsanitary" nor lacking in equipment.

[4]When his family ski weekend was postponed, petitioner started work 2 weeks later than planned. He was still given charts to review for the 2-week period prior to his arrival. Though petitioner fully accepted responsibility for those charts, the district judge pointed to what he termed an attempt to explain away liability because of his "ski trips", as a reason to have added a 2-point perjury adjustment to his Guideline level. Though we showed below that every reason cited by the court for finding perjury was belied by the record, the Court of Appeals--which granted only 5 minutes for oral argument--did not discuss perjury.

Moreover, witness Ferns *confirmed* that petitioner had instructed him not to prescribe certain medications without lab confirmation of conditions or where contraindications existed, and had told staff to call patients whose lab results indicated the need for a follow-up visit--an effort inconsistent with "knowledge" that patients were not "real" but were instead "playing the docs". Indeed, neither PA Ferns nor Khan rebutted petitioner's trial testimony that he was without knowledge of "the fraud" at all times, and they confirmed that he resigned seven weeks after he came, immediately after discerning Khan's connection with the lab when Khan blocked his effort to

eliminate some "routine" blood tests.[5] He resigned despite making a substantial sum of money (over $85,000)--a fact harped on by the government as if making money in a

---

[5]New York State Clinical Laboratory Association, Inc. v. Kaladjian, 194 A.D.2d 189, 605 N.Y.S.2d 499 (3d Dept. 1993) discussed a 1992 amendment to a Medicaid regulation prompted by the type of billing that Khan's lab did. Medicaid determined that, generally, based on labs' marketing and communications techniques, "physicians ordered profiles and panels primarily", not because they intended "fraud", but "as a matter of convenience, their main concern being only one or two of the component tests." Determining that this practice "resulted in the performance of costly, medically unnecessary tests inuring to the financial benefit of the independent laboratories at taxpayer expense", Medicaid enacted the regulation that bars this practice by the labs.

There is no question that petitioner believed that the "profile" was not unduly expensive. PA Ferns testified he heard Khan tell petitioner that Khan's "labs" "were not really that expensive", "hardly $95 or something and that is nothing compared to what the hospitals order". Kingpin Khan testified that he was told by his lab that the profile cost between $135 to $150 per patient, not the $300 to $667 actually charged (per government exhibit). Nonetheless, petitioner became concerned when informed after a routine Medicaid audit that he could be liable for whatever Medicaid deemed "unnecessary". Though that audit occurred only two weeks after petitioner came to the clinic and he stayed 5 weeks after, the prosecutor and court perversely used the *fact* of the audit as the supposed reason why evidence of petitioner's *good* faith conduct should be construed as conduct designed solely as a "cover" for guilt.

busy medical practice should connote "fraud" the same way that one's receiving thousands of dollars for carrying a suitcase through Customs connotes drugs.

The Second Circuit seized on other incidents of petitioner's experience supposedly "establish[ing] [petitioner's] knowledge of the clinics' fraudulent nature" (12a). As to "expert testimony indicating the fraudulent nature of...patient charts" (12a), there was testimony by two Medicaid-paid peer reviewers that, upon "lining up" patient charts at the Khan clinics (which petitioner of course did not do), it was obvious that the charts were "phony" because "one [chart] was just about the same as the other one". Though not revealed to the jury nor mentioned by the

Second Circuit, before the experts even began evaluating charts, they knew what petitioner did not know: that Medicaid undercovers ("shoppers") had feigned illnesses at the clinic and received (or were promised) pills in return for giving blood, but their charts showed "real" complaints and examinations. Though these experts thus had this *basis* to believe that charts similar to those of "shoppers" were equally fraudulent, this gave no reason that petitioner "should have known" or deduced "fraud". (The peer reviewer who reviewed petitioner's charts, after speaking with petitioner, stated only that what he authorized may not have been consistent with what "normal doctors" do (Tr.1573)). Because the jury instruction did not require the jury to find that

petitioner had knowledge of the blood-for-pills scheme charged in the indictment (a circumstance which the Court of Appeals held did not amount to a constructive amendment (17a)), the jury could have convicted based on only one "unnecessary test" as deemed by Medicaid. "Expert" testimony thus did *not* prove petitioner's knowledge of "the fraud", nor gave a basis to find he deduced fraud as opposed to acting out of continued ignorance.

The Court pointed to supposed "specific evidence of Ross' knowledge": the first was that he was "present at the clinic for approximately three days each week, and therefore had ample opportunity to observe the utterly inadequate facilities" (12a). While PAs testified about deficiencies in the facilities

(housed in a poor section of the Bronx where thefts occurred often) no one--no PA, nor either cooperating doctor--claimed to have discerned "the fraud" (about which all had been unaware at the beginning) from the condition of the facilities. It was only the court's (and government's) judgment that one "should have known" from the conditions that the clinics were "a fraud", and it was only this judgment that underlay the conclusion that this was "specific evidence of ... knowledge".[6]

Next, the Court said, petitioner "met with staff members in the area where signs were posted indicating that only new patients were welcome" (12a), which reflected Khan's policy, inconsistent with

---

[6]Dr. Ross, moreover, interned at the famous Bronx Jacoby Hospital and did his residency at Bellevue in New York City. He hardly would think of "fraud" as the answer to chaos, dirt, or theft.

a "real" medical practice, that there would be no "follow-up visits" because second visits were (supposedly) not paid for as dearly by Medicaid as first visits. Sadly, the Court's "finding" that Dr. Ross met with staff members when and where such signs were posted was based only on a statement in the government's appeal brief (Br.76) and had no foundation in any evidence. As described at length in our appeal brief and supported with precise record references, noone testified that any such sign was posted at a clinic when Dr. Ross was working there. The Agent who saw signs at Dr. Ross' clinic saw them nine months after Dr. Ross had left; others saw them at different clinics. The only time such signs made sense was when there was only one doctor on "staff" at

any clinic, and that never was the case when petitioner was there). Moreover, two Medicaid witnesses (a "shopper" and investigator) who were at Dr. Ross' clinic said nothing about having seen any damning signs. Though the government had no *evidence* that Dr. Ross had reason to see any sign, it told the appellate court, as it told the jury, that they should disregard Ross's "self-serving testimony" that he did not see the signs and find him a liar and a Medicaid thief.

The last piece of evidence supposedly constituting "specific evidence of Dr. Ross' knowledge" was the fact that, after Medicaid auditors had taken 20 charts to review, Dr. Ross had sent a letter to his PA directing that a certain medication (Mevacor) be prescribed only when high

cholesterol was confirmed by lab tests.[7] The Court--again uncritically seizing prosecutors' assertions--held that because this event occurred shortly after a Medicaid auditor had visited and taken files to review, this was "evidence that Ross wrote the letter to cover his tracks". The Court also noted that "Ross left the clinic shortly after this incident" (12a).

Ross did *not*, however, leave "shortly

---

[7]The Court's description of the event--Ross's having "sent a letter to his PA directing that a certain drug be prescribed" (12a)--*sub silentio* confirmed that the government allowed PA Ferns to lie at trial. Ferns made the absurd statement that it had been his (Ferns') idea to "put a lid" on the drug without lab confirmation, and that the letter that Dr. Ross wrote to Ferns only echoed what Ferns had first told Dr. Ross. Such testimony, of course, detracted from the showing of Dr. Ross' good faith. As if truth did not matter, the government allowed this ridiculous lie to stand even when Ferns had no explanation for not having shared his idea with other doctors for whom he was the PA, and though Ferns told Medicaid officials after the fact that Dr. Ross told him not to prescribe Mevacor.

after this incident". The "incident" occurred after the second week of his presence; he stayed five weeks more. The Court's observation (or, put the way it unfortunately appears, the prosecution's position) neither identifies nor even suggests anything about when, or how, Dr. Ross--whom the prosecution *conceded* had no knowledge of "the fraud" when he arrived--gained such knowledge. The mere fact that there was an audit--which the Medicaid investigator himself termed a routine one and stated that Dr. Ross was extremely cooperative--did not establish that Dr. Ross became aware of any fraud. There was nothing about the audit itself that gave Dr. Ross knowledge of "the fraud", nor any conduct on his part demonstrating his subjective discernment (or "avoidance").

The Court's conclusion was based on no rational inference: there was no evidence that petitioner had said or done anything to indicate his awareness or avoidance of "the fraud" in the two weeks before the auditor came. And if petitioner feared detection because of an audit, why did he not do more than merely tell the PA about suitable prescriptions and stay 5 more weeks? The only rational conclusion was that he continued to act out of ignorance: The Court unfairly deemed evidence that Dr. Ross tried to supervise the PA, as he set out to do, as evidence of "knowledge" of "the fraud" instead of construing it as the good faith it denoted.

The Court next offered the rationale that, because Dr. Ross, testifying in his own defense, denied having had knowledge

of the fraud, the jury's rejection of his testimony somehow added to the sufficiency of the government's case concerning "knowledge". The court said that under United States v. Friedman, 998 F.2d 53, 57 (2d Cir. 1993), the jury "was entitled to consider Ross' credibility in determining his knowledge" and that the defendant "waive[d] any claim as to the sufficiency of the Government's case considered alone" (12a). The Court did not explain how Dr. Ross's testimony, unrebutted in any significant respect (as we painstakingly showed), strengthened inferences urged by the government based on only its own say-so. Where the only "difference" between the government's case and the defendant's testimony was petitioner's statement that he had not discerned "the fraud" from the

facts, it was unfair to convict him (much less to penalize him with two additional points for "perjury") merely because he testified. Given the lack of evidence on the government's case showing how, why, when, or from what, Dr. Ross supposedly had discerned "the fraud", the Court's facile statement that the jury was "entitled to consider Ross' credibility in determining knowledge" was neither a valid answer nor consistent with the Court's own prior cases.[8]

The court's lax standard of appellate review endorsed a conviction based on negligence--that petitioner "should have

---

[8] *Friedman*'s predecessors made it clear that it is only when a defendant's testimony is considered "[i]n light of the government's [other] evidence [that] the jury [could] conclude that [the defendant's] version of the events was false and thereby infer his guilt". United States v. Marchand, 564 F.2d 983, 985-86 (2d Cir. 1977), cert. denied, 434 U.S. 1015 (1978).

known"--a theory the prosecution denied advancing but which became explicit with the proffer of a Dr. Girgiu, who had started to work at the clinic but left. The prosecutor argued that he needed this evidence because in this "conscious avoidance" case, the testimony would show "what a medical practitioner knows or should have known". Though the trial court excluded the testimony, its rationale was not that a doctor could not be convicted for what he "should have known" (or negligent supervision), and that therefore what another doctor "knew" was irrelevant--but rather that it was a different PA whose charts Girgiu had supervised. The trial court further manifested adoption of a negligence theory when, during pre-sentence discussions, it

concluded that what was done here was "reasonably foreseeable" and that doctors "were merely charged with not supervising"[9] and so were not "managers" for Sentencing Guidelines purposes. (The proffer also demonstrated the ease with which a jury could confuse issues of fraud with issues of medical propriety: reportedly, even Dr. Girgiu did not leave the clinic because he discerned the charged "blood-for-pills" scheme or that patients were not "real"; he was represented to have "believed" only that "many of the prescriptions" and "office tests" were "unwarranted". When the court gave an instruction that did not require the jury to find that petitioner "knew" of the "blood for pills" scheme, it allowed a conviction premised on

---

[9]Tr. October 20, 1993 at 24, 27.

"overutilization"--billing Medicaid for a procedure that it later termed "unnecessary", such as blood tests that petitioner tried to change.[10]

The final basis on which the Court affirmed Dr. Ross' "knowing" participation was through its statement that "evidence also was consistent with conscious avoidance" (12a). Its description of evidence supposedly showing such "avoidance" (discussed in the footnote),[11]

---

[10]A short time ago Medicaid (and other insurers) deemed mammograms "unnecessary" without specific symptoms. Those doctors who believed their preventative worth greater than the costs prevailed. "Overutilization" is thus hardly a science, and an insufficient and dangerous ground on which to justify a criminal conviction.

[11]The government's brief argued (Br.79-80) that its proof showed that,

> [w]hen PA told [petitioner] that all the patients came with the same complaints, for which Ferns gave them prescriptions, Ross simply 'swallowed' and said nothing. When [PA] Ferns suggested ... that [petitioner] should speak to Khan about [his] prohibition against unprofitable urine tests, Ross

(continued...)

however, came directly from statements in the government's brief and concerned conduct of doing "nothing". Doing "nothing", however, did not show discernment of "the fraud" as opposed to lack of discernment and confusion or satisfaction with an explanation given upon an inquiry (as discussed below).[12]

---

[11](...continued)
listened and did nothing. When Ferns told Ross that he had never bothered to check the results of the extensive ...blood tests, Ross did nothing.

The Court of Appeals parroted the government's words and held that "doing nothing" was evidence of "consciousness" and "avoidance" [12a-13a]:

> When Ross was informed that all of the patients came in with the same complaint, he did nothing. When the PA suggested to Ross that he speak to Khan about a nonsensical prohibition on urinalysis, Ross did nothing. This, and the evidence mentioned above, is consistent with awareness of a high probability of the criminal nature of the scheme and the decision to avoid confirming its criminality.

[12]As to PA Ferns' "advice" to petitioner that patient "complaints" were all the "same", the trial judge acknowledged after trial that, as petitioner
(continued...)

Neither the Court nor the government, indeed, explained how "doing nothing" was consistent with "awareness" that the venture was criminal nor even a "high probability" that patients were not "real". (Notably, though PA Ferns examined patients, he testified that he first learned of "the fraud" when a "security guard" told him about "playing the docs").

---

[12](...continued)
had testified, Khan had told petitioner that there were only a handful of illnesses handled at the clinic because that was what PAs could capably handle, and PA Ferns confirmed that that was so. While the government thus used "similarity of complaints" as a basis on which petitioner "knew or should have known", with "experts" "lining up the charts" after the fact and claiming a "statistical improbability" that a "normal" medical practice would see such limitations in a medical practice, there was no suggestion that petitioner had not been satisfied by Khan's explanation, nor any reason to hold that all medical practices must be "rounded" and cater to all people and all illnesses. Moreover, had petitioner "known" from the limited diseases and intended to "cover", he would have insisted on describing more illnesses, not allowed the status quo to continue.

No one asked Dr. Ross when he testified whether he had heard anything from PA Ferns about urine tests or if so what he understood. Both Khan and Ferns speak with heavy foreign lilts.

Nor did petitioner "do nothing" in any event: before he started, he checked with the Medical Society concerning "off-premise" supervision. When Ferns told petitioner that the lab results were not in the file and later that he (the PA) did not review the results, Dr. Ross began reviewing them himself, instituting a procedure by which phone numbers were placed on the patient charts. When Dr. Ross saw lab results that suggested that a follow-up was required, he told staff to notify patients to return or to go to the emergency room. When he saw inappropriate medications, he instructed the PA about different ones. Dr. Ross also questioned the lab profile repeatedly: Not only did he telephone the lab to try to change the profile--as confirmed by Khan's

conversation with petitioner after he spoke to the lab--but as both Khan and PA Ferns confirmed, petitioner was assured by Khan repeatedly that the lab tests cost less than they actually cost. Then, when he did deduce that Khan had something to do with the lab because of the return phone call from Khan, petitioner resigned! All this was proven at trial. The ipse dixit answer--that petitioner did these things only to "cover" so that he could continue committing fraud--was premised on no evidence that petitioner had ever "known" in the first place such as would warrant a further conclusion that innocent conduct was a "cover" for guilt.

The Conscious Avoidance Instruction: Despite the focus on "conscious avoidance" the trial judge failed to instruct the

jury with the "balancing language" which requires consideration of defendants' "actual beliefs" and is deemed crucial to prevent convictions based on negligence. The Court, finding that the defendants had not requested such a charge (and ignoring our contention that counsel was legally ineffective for failing to request it, inter alia), concluded that failure to give the balancing charge was not "plain error" (17a). The Court dismissed as apparently unimportant the fact that the government had requested the instruction (16a), and did not comment on our additional showing that the "conscious avoidance" charge was constitutionally defective because it did not identify for jurors what "fact" was supposedly "avoided". (The instruction referred only

to the defendants' awareness of a high probability that "the representations charged in the indictment were fraudulent"--whatever that may mean.)

Further, though cases make clear that in a "conscious avoidance" case jurors must find both that defendant was aware of a "high probability of the fact in dispute" and "consciously avoided confirming that fact", United States v. Rodriguez, 983 F.2d 455, 458 (2d Cir. 1993), and though the "fact in dispute" here was knowledge that patients feigned illnesses to obtain prescriptions and that prescriptions were being given to them so that Medicaid could be billed for unnecessary tests, the 60-plus-page jury charge makes no mention of "playing the doctors" or the exchange of prescriptions

for patients' blood or their participation in other tests. The court instead charged "the scheme" as simply applying for and obtaining payment from Medicaid "for medically unnecessary tests and procedures ...performed or claimed to have been performed at ... offices set up and run by ... Khan". The Court did not explain the expansive term "medically unnecessary", nor was concerned that a doctor could be convicted for authorizing any test later deemed "overutilization" upon Medicaid review. The Court of Appeals rejected our argument that this constituted a constructive amendment of the indictment, holding that this had only permissibly "narrowed" the charges (18a).

RICO: Petitioner stayed at the clinic for

7 (or 9[13]) weeks, resigning after trying to eliminate lab tests and finding his phone call to the lab returned by Khan. The Court of Appeals rejected the notion that an individual's own conduct controls whether he is guilty of RICO, holding that petitioner's conduct constituted a "pattern" because of the statement in H.J. Inc., supra, 492 U.S. at 242, that a "threat of continuity" can be established by showing that "predicate acts of offenses are part of an ongoing entity's regular way of doing business" (13a). (The Court did not discuss petitioner's claim that his trial counsel was ineffective for failing to appreciate and argue that seven-weeks' conduct is not a "pattern").

---

[13]Because petitioner reviewed charts covering the 2-week period before he actually "started", the government argued he was "there" for nine weeks.

Restraint of Petitioner's Assets: Prior to trial, a post-indictment, pre-trial restraining order was signed on an ex parte basis pursuant to RICO, 18 U.S.C. § 1963(d)(1) and the money-laundering forfeiture statute, 18 U.S.C. §982(b)(1). The order, signed before the indictment was unsealed, prevented petitioner from using any of his assets for any purpose without a court order, even to defend himself. Trial counsel succeeded in having the government release some $106,822.56 under an "agreement" that, in consideration of the government's release of said funds for his defense, there could be no "further or additional" payments of any legal fees or expenses "in connection with Dr. Ross' defense in this case from [any of his] assets"--"regardless of the

length or number of trials in this case, appeals, change of counsel, or other unanticipated issues related to Dr. Ross's defense". The "agreement" also required petitioner to withdraw any request for relief from the restraining order "including any request for a Monsanto hearing". These provisions were in effect throughout the trial.

After trial, which concluded with a conviction on the mail fraud and RICO charges, an acquittal on the money laundering charges, and a $40,000 forfeiture verdict, new counsel requested vacatur of the RICO pre-trial restraining order because, given a forfeiture verdict limited to $40,000, the government had no business restraining assets beyond that amount. In response, the prosecutor asked

the court for and was given an all-assets restraining order under the All Writs Act, 28 U.S.C. §1651 (31a). Though the government pointed to nothing supporting the propriety of tying up a defendant's assets once a jury renders a forfeiture verdict less than the defendant's assets, nor to any authority that permits the government to continue to hold all (or any) of a person's assets only because a fine or restitution "may" be imposed, the trial judge held that it would use its "residual power" to prevent the defendant from spending his money so that it would be "available" for restitution. The Court entered this order though at the time, it had seen nothing about the defendant's financial resources, needs, obligations, or earning capacity, nor anything about

the needs of his wife and three children, and although it was plain that Dr. Ross would lose his livelihood as a result of this conviction as well.

At sentencing, the court (as promised) imposed "full" restitution on petitioner without consideration of his family's needs or other factors spelled out in 18 U.S.C. §3664(a) (see 36a). Though petitioner's net worth (including his family home) was valued at $560,000, the Court ordered restitution of $612,000 to be paid "immediately". The court refused to release money needed to repay loans for extensive post-trial (appellate and disciplinary) defense, expressly rejecting the notion that the Sixth Amendment requires a court to allow a defendant to use his own, non-forfeitable

funds for his defense and that a court imposing restitution must allow such expenses before restitution is imposed.

The Court stayed the immediate restitution order pending appeal but kept in place the All Writs Act restraining order: from the moment petitioner was indicted until the present, the government prevented him from using his own funds to pay counsel and defend himself. While the Court of Appeals reversed the restitution order because the court had made no findings about any defendant's resources and abilities as required by 18 U.S.C. §3664(a), it did not discuss the Sixth Amendment concern nor held that the district judge had erred in refusing to release funds for defense expenses before finding any specific amount "available" to

pay restitution. Nor did it release the All Writs Act restraining order so that petitioner would have his funds freed.

REASONS FOR GRANTING THE WRIT

I. Given The Proliferation of "Conscious Avoidance" Cases, The Laxness with which the Concept is Applied, The Lack of Guidance By This Court, The Conflict In Circuits, And The Recognized Risk Of Unfair Convictions, The Court Should Grant *Certiorari* To Consider The Constitutionality of Conscious Avoidance Convictions *Vel Non*, And If Constitutional, The Evidentiary Showing Necessary To Invoke the Concept and Instructions Required To Prevent Convictions Premised On Negligence.

In a comprehensive law review article entitled The Ostrich Instruction: Deliberate Ignorance As A Criminal Mens Rea, 81 Jrnl.Crim.L.&Criminology 191 (1990), Professor Ira Robbins reviews the emerging law of "conscious avoidance" and concludes that the "deliberate ignorance" charge is incompatible with the

Constitutional requirement (In re Winship, 397 U.S. 358, 364 (1970)) that the prosecution prove each element of a crime beyond a reasonable doubt. The author shows, in a work that should be reviewed in depth, that the conscious avoidance instruction as generally given--even with "balancing language" requiring a jury to focus on the "actual belief" of a defendant--permits convictions based in fact on recklessness or negligence in cases where, as here, the law requires actual awareness of a fact. Professor Robbins also discusses "the additional danger of *imprecise* jury instructions allowing conviction for merely negligent behavior, thereby eliminating even the subjective aspect of knowledge". Id. at 195. (Here, as discussed, the instruction

did not even identify the "fact" supposedly avoided, much less contained "balancing language").

This Court has given little consideration of or guidance about "conscious avoidance" though, as an increasingly-used prosecutorial tool, and one which has created a conflict in Circuits about what evidentiary showing is required to justify an instruction, it warrants guidance. Although this Court seemingly "signaled" that "deliberate ignorance" might work as an alternative to actual knowledge in Spurr v. United States, 174 U.S. 728 (1899) (a case involving "willfully certifying a check with insufficient funds in the drawer's account"), it not only further "signalled" that an evidentiary showing is necessary

(that the defendant "shut his eyes to the fact and purposefully refrained from inquiry or investigation for the purpose of avoiding knowledge"), but suggested caution: the Spurr Court *reversed* the conviction because of the trial judge's inadequate response to a jury request for clarification of the "willful" element, which had foreclosed the defense that the defendant had had an honest contrary belief in the sufficiency of the drawer's funds. 174 U.S. at 739.

This Court only fleetingly dealt with the issue again in Leary v. United States, 395 U.S. 6 (1969) (discussed in the footnote)[14] and Turner v. United States,

---

[14]In Leary, this Court held unconstitutional a presumption that marijuana smokers had knowledge--even using the Model Penal Code's definition that equated awareness of a high probability of the fact for knowledge ("unless he actually believes that [the fact] does not exist")--that their marijuana

(continued...)

396 U.S. 398 (1970), when it cited the fact that the Model Penal Code did not require "actual knowledge" and confirmed that actual knowledge by heroin traffickers that the product is smuggled was not required if they "practice[d] a studied ignorance" of that fact. According to the Robbins article, these cases led to an increasing frequency of "conscious avoidance" charges in narcotics cases and then to other types of cases.

United States v. Jewell, 532 F.2d 697 (en banc), cert. denied, 426 U.S. 951 (1976) is the first comprehensive discussion of the deliberate ignorance instruction, and the case from which later cases spring. Though the defendant argued there that, given the existence of some

---

[14](...continued)
had been imported.

evidence circumstantially supporting actual knowledge, the jury must find actual knowledge or acquit, the Court instructed that the government could sustain its burden by proving that, if the defendant was not actually aware of the marijuana in the vehicle, his ignorance "was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth", 532 F.2d at 700. The Ninth Circuit majority affirmed, but noted that "the required state of mind differs from positive knowledge only so far as necessary to encompass a calculated effort to avoid the sanctions of the statute while violating its substance. 532 F.2d at 704.

Notably, now-Justice Kennedy, joined by three others, dissented, writing that the instruction was "unacceptable because true ignorance, no matter how unreasonable, cannot provide a basis for criminal liability when the statute requires knowledge". 532 F.2d at 707. Notwithstanding the cogent dissent, as explained by Professor Robbins, the Jewell instruction now is used with so much frequency that it has all but swallowed the prosecutor's need to prove knowledge beyond a reasonable doubt.

Courts have and did require, however, that--because a conscious purpose of knowing the truth was deemed to satisfy criminal liability requirements only when the defendant was "aware of the high probability" of the fact in dispute (such

as the vehicle carried contraband)--there must be an instruction concerning subjective awareness. In United States v. Esquer-Gamez, 550 F.2d 1231 (9th Cir. 1977), the Court addressed what was then and thereafter to be deemed vital "balancing" language necessary to comport with the burden of proving knowledge beyond a reasonable doubt (language that the Second Circuit in this case excused only because, though the government had requested it, defendants' then-counsel had not requested it). The balancing language requires the jury to determine whether the defendant had an "awareness of a high probability" of the fact the government claims he knows, permitting a conviction on such "awareness" "unless [the defendant] actually believes it does not

exist." 550 F.2d at 1235.

We agree with the suggestions in the Robbins article that the Jewell/ Model Penal Code instruction does not comport with the Constitutional requirement of proof beyond a reasonable doubt in any case where, as here, knowledge is a requirement: the instruction does not comport with "philosophical []or legal concepts of knowledge", and permits convictions based on recklessness or negligence, without knowledge. This Court should grant the writ and hold that "conscious avoidance" is not consistent with the Constitution and that prosecutors must prove actual knowledge when knowledge is an element of an offense.

The use of the instruction is particularly egregious here, since the

Court did allow a conviction based on what others knew. This is shown by statements concerning what doctors "should have known" made during the proffer of Dr. Girgiu, and the Court's reliance on the conditions of the clinic, which to the government (though not to any doctor or PA) signified "fraud". This Court should grant the writ not only to make clear that, if "conscious avoidance" charges are Constitutional, they cannot rest on objective indicia of "knowledge", but also to remedy the unfair use of the conscious avoidance theory to convict an innocent man and caring doctor who, even if he "should have known", was not shown "aware" even if others were, and nonetheless faces prison and the loss of his license and livelihood.

At a minimum, *certiorari* review will permit the Court to require that a conscious avoidance instruction is never valid unless it contains the "balancing language" focusing on a defendant's awareness. Because such language is vital to focus on a defendant's ignorance, we suggest that it cannot be deemed harmless error to omit it, and its omission is always "plain error". This Court should take this case and overrule the holdings of the many courts that have allowed deficient "conscious avoidance" instructions to stand.

Indeed, as the Robbins article discusses (pp.227-231 "Risk of Conviction For Negligence"), the Courts of Appeal have themselves recognized the need for the "unless" and "actual belief" balancing

language; indeed, our own Second Circuit termed a conviction had without such an instruction "suspect". United States v. Bright, 517 F.2d 584, 587 (2d Cir. 1975). One wonders how the same Circuit could have sanctioned the instruction here when it felt so strongly about the need for balancing language in a conscious avoidance instruction that in United States v. Ferroz, 848 F.2d 359 (2d Cir. 1988), it ordered that copies of its opinion holding that an acceptable conscious avoidance should contain the balancing language should be issued to all United States Attorneys within the Circuit. Indeed, there are such serious risks in a conscious avoidance instruction that some courts (but not the Second Circuit) have agreed that an instruction

should not be given (to "supplement" an instruction on knowledge) unless there is specific evidentiary support. Once again, Justice Kennedy (concurring in part and dissenting in part) aptly noted in United States v. Marietta-Bejarano, 552 F.2d 1323, 1326 (9th Cir. 1977), that a conscious avoidance instruction invites juries to avoid scienter and convict because of standards "analogous to negligence". He counseled:

> The Jewell instruction should not be given unless the evidence can sustain a finding beyond a reasonable doubt, that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged.... The danger is that juries will avoid questions of scienter and convict under the standards analogous to negligence. Such convictions are wholly inconsistent with the statutory requirement of

scienter.[15]

Though some courts do require evidence of a deliberate purpose to have a defense in case of an arrest before an instruction is deemed proper and evidence held sufficient (as discussed in the footnote),[16] the Second Circuit allows use of a conscious avoidance charge without specific evidence

---

[15]Courts do in fact use "should" language (as occurred in this case), specifically exacerbating the risk of conviction for negligence. Thus, in United States v Eaglin, 571 F.2d 1069, 1074 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978), the Court reviewed an instruction that the jury could convict if the defendant "intentionally avoid[ed] knowledge by closing his eyes to facts which should [emphasis added] prompt him to investigate". The "should" standard was, we suggest, the controlling factor in this case.

[16]At least the Fifth, Ninth, Tenth and Eleventh Circuits require an evidentiary showing. See United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991); United States v. Sanchez-Robles, 927 F.2d 1070 (9th Cir. 1991); United States v. Aleman, 728 F.2d 492, 494 (11th Cir. 1984); United States v. Batencort, 592 F.2d 916, 918 (5th Cir. 1979). In addition, the First Circuit, in United States v. Picciandra, 788 F.2d 39, 46 (1st Cir.), cert. denied, 479 U.S. 847 (1986), suggested that the instruction should not be given unless "facts suggest a conscious course of deliberate ignorance".

of a conscious purpose to avoid detection. This conflict in Circuits already prompted the dissent of two Justices of this Court from the denial of certiorari in a case arising in the Second Circuit raising this same issue three years ago, in which the defendant-petitioner and the government conceded that the conviction would not stand in Circuits other than the Second, itself agreeing on the need for certiorari review. See Tomala v. United States, 504 U.S. 932 (1992) (White and Thomas, JJ., dissenting). As Justice White stated in terms that are applicable here, "the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried". Because things have gotten worse since Tomala (as expressed by Professor Robbins, who

suggests that the instruction "create[s] a presumption of guilt when there was no evidence of deliberate ignorance"), this Court should take the case, put an end to the conflict, and give guidance on an instruction which, through burgeoning, improper use, snares innocent persons and obliterates the requirement of proof of all elements of a crime beyond a reasonable doubt. Petitioner would not have been convicted in any other Circuit; he should not have been convicted here.

II. The Court Should Grant The Writ To Enforce The High Standard Of Proof Necessary For A Criminal Conviction As Expressed *Jackson v. Virginia*, 443 U.S. 307 (1979)

In Jackson v. Virginia, 443 U.S. 307, 316-18 (1979), this Court held that the "reasonable doubt" standard imposes a Constitutional duty on federal courts to

assure that a criminal conviction is based on more than the existence of "some" evidence that supports a conviction. Rather, it held, Winship requires an evaluation of the quality of the evidence:

> A doctrine establishing so fundamental a substantive constitutional standard must also require that the factfinder will rationally apply that standard to the facts in evidence .... A "reasonable doubt," at a minimum, is one based upon "reason." .... Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt, and the same may be said of a trial judge .... In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction.... Under Winship, which established proof beyond a reasonable doubt as an essential of ... due process, it follows that when such a conviction occurs in a state trial, it cannot constitutionally stand [footnotes and citations omitted].

Though Jackson establishes a standard of law that appellate courts are bound to enforce, Second Circuit Chief Judge Jon O. Newman observes that the rule of law is not being followed. In Judge Newman's incisive article, Beyond "Reasonable Doubt", 68 N.Y.U.L.Rev. 979 (1993), discussed with approval by Justice Ruth Bader Ginsburg, concurring in Victor v. Nebraska, ___ U.S. ___, 114 S.Ct. 1239 ((1994), Judge Newman expresses grave concern that, while the "reasonable doubt" standard has been accepted as a verbal formulation to be conveyed in jury charges, appellate courts have failed to take the standard seriously as a rule of law against which the validity of convictions is judged. 68 N.Y.U.L.Rev. at 999. He believes that courts affirm when

there is only "some" (if any) evidence of a crime without carefully analyzing to assure that the proof meets the high level of proof required under Winship and Jackson; Judge Newman stated that, if courts were adhering to the standard, one would see many more than the mere two judicial decisions that turned up in a "Westlaw search" where the appellate court had indicated that, while the proof might meet a preponderance standard, it did not satisfy the "beyond a reasonable doubt" standard. Judge Newman explained that, when courts stress the underscored word "any" in describing what Jackson requires ("the relevant question is whether ... any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt", 443 U.S. at 319)

instead of focusing on Jackson's immediately preceding words ("[a]fter Winship the critical inquiry ... must be ... whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt", 443 U.S. at 318), they accept a "less demanding form of review than the `reasonable jury' standard" which the Constitution requires. 68 N.Y.U.L.Rev. at 988. This is because the two sentences "convey quite different thoughts": the first, "correctly" in Judge Newman's view, "applies the traditional test for determining sufficiency of evidence--namely, whether the law's ubiquitous reasonable person...could find the matter proven by the requisite degree of persuasion"; and the second "shift[ing] the emphasis away from the law's construct

of the reasonable jury and conjur[ing] up the image of a vast random distribution of reasonable juries, with the risk of creating the misleading impression that just one of them need be persuaded beyond a reasonable doubt". Id. at 987. As Judge Newman noted (id. at 992):

> In the civil context, the "reasonable person" construct has never been thought to require persuasion of just one out of a random distribution of many. When we ask whether the evidence in a negligence case is sufficient to permit a jury to find in the plaintiff's favor, we ask whether a reasonable jury could have concluded that negligence was proved; [footnote omitted] we do not permit a plaintiff's verdict to stand just because it could be said that any one of a thousand reasonable juries could have found in the plaintiff's favor.

We argued in the Court below that in light of Judge Newman's apt concerns about the lack of "meaningful observance

of th[e Jackson] standard as a rule of law for testing the sufficiency of evidence", the Court would be unable to find sufficient evidence that Dr. Ross had knowingly joined the scheme. In our briefs, we stressed Judge Newman's formulation of the undue reliance on the Jackson word "any".

As if to give the back of its hand to Judge Newman's concerns, the Second Circuit (apparently purposefully) relied on the underscored "any rational trier of fact" language that Judge Newman explained signified acceptance of a too-low standard (8a). It went on to accept as fact prosecutorial assertions not rationally based on proven facts, and deemed prosecutorial argument--such as that petitioner acted innocently merely to

"cover"--sufficient proof of those "facts" to which it pointed. Especially when it also allowed proof of what other doctors purportedly had "known", the Court doomed an innocent man to a conviction. This Court should grant certiorari and clarify that Jackson fully applies to appellate review, and should make sure that Courts of Appeal understand that this is not some academic exercise that allows guilty people to go free on a "technicality", but is how guilt is to be determined in the first instance. A proper application of Jackson would result in reversal here.

III. The Writ Should Be Granted To Make Clear That RICO Does Not Apply To People Whose Conduct Is Limited, Based Only On The Conduct Of Others; If RICO *Can* Be So Applied, The Court should Hold RICO Impermissibly Vague and Unconstitutional

In H.J. Inc. v. Northwestern Bell Telephone Company, supra, 492 U.S. 229

(1989), this Court held that "[p]redicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [RICO's pattern] requirement." Despite this, the Court below held that, though petitioner's conduct endured only seven weeks, he could be guilty of RICO because of another statement in H.J. Inc. --that a "threat of continuity [such that conduct can amount to a "pattern of racketeering activity"] may be established by showing that the predicate acts ... are part of an ongoing entity's regular way of doing business". This is not only inconsistent with Due Process notions of individualized guilt; it is inconsistent with this Court's decision in Reves v. Ernst & Young, __ U.S. ___, 113 S.Ct. 1163 (1993), holding

that liability under RICO requires that a defendant himself have had some part in managing an enterprise's affairs. This Court should grant certiorari to remedy the further unwarranted expansion of RICO the decision below represents. To the extent that the Court were to conclude that RICO does cover the conduct here, the Court should hold RICO unconstitutional.

Indeed, the majority in H.J. Inc. all but conceded that RICO is vague, noting the "definitional problems that arise in interpreting RICO's pattern requirement" which "inevitably lead to uncertainty regarding the statute's scope." 492 U.S. at ___ n.3. If that "uncertainty" allows the conviction here, for others' conduct, then, for reasons suggested in Justice Scalia's dissent in H.J. Inc. (492 U.S. at

251-56)--suggesting that the Court's inability to define "pattern" "bode[d] ill for the day when [a constitutional] challenge [wa]s presented" to the Supreme Court, id. at 256--this Court should grant *certiorari* here, where the issue is squarely presented, and void RICO as the unconstitutionally limitless legislation it is. At least it should explain that H.J. Inc. does not allow a conviction where a defendant's own conduct does not "threaten continuity".

IV. The Writ Should Be Granted To Prevent The Limitless Use Of The All Writs Act To "Secure Restitution" And To Prevent A Defendant From Using His Own Funds For His Defense

As noted, the Court of Appeals allowed to stand an unprecedented use of the All Writs Act to "freeze" petitioner's assets "pending restitution" and

thereafter, disentitling petitioner to the use of his own funds even for attorneys fees, despite his Sixth Amendment rights. The use of the All Writs Act in this way is so seriously abusive--and is so referable to every criminal case in which a defendant is convicted--that, though we have found no other case in which the All Writs Act was used in this way, this Court should correct the abuse now. If it is not corrected, the government will be able to prevent a defendant from having access to funds legitimately needed for counsel fees in every case.

Though this Court warned against "ad hoc" use of the All Writs Act where other processes are in place, the warning is apparently not strong enough to prevent the type of abuse that occurred here. See

Pennsylvania Bureau of Corrections v. U.S. Marshal's Service, 474 U.S. 34, 43 (1985) (Act does not empower federal court to issue "ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate...."). Here, not only did Congress provide a comprehensive scheme for imposing *and* enforcing restitutionary orders (31a-37a), but it not create a "restitution" restraining order remedy as it has done under RICO (see 29a et seq.) and the money laundering statute. The lower Courts' arrogation to themselves of the power to circumvent lawful procedure cries out for a strong remedy.

The issuance and refusal to vacate the restraining order here not only was a misuse of the All Writs Act because of

generalized needs that must be considered before restitution is considered; it violated and continues to violate Dr. Ross' Sixth Amendment "right to spend his own money to obtain the advice and assistance of counsel". Walters v. Nat'l Assoc. of Radiation Survivors, 473 U.S. 305, 370 (1985) (Stevens, J., dissenting), quoted with approval in Caplin & Drysdale, Chartered v. United States, 491 U.S. 617 (1989). The government's argument below that Caplin supported what it did here requires a firm response: prosecutors thus argued that by "analogy" to Caplin's holding that it is no Sixth Amendment violation to prevent a defendant from using forfeitable funds for legal defense needs, the Court should be able to prevent a defendant from using funds so that he

could pay restitution. Forfeiture and restitution, however, are vastly different. As made clear in Caplin, it is only because of the "relation back" doctrine--the fiction that the government's interest in a forfeitable res vests as of the time of the wrongdoing--that the government can claim moneys otherwise needed by a defendant for counsel fees without violating the Sixth Amendment. There is no similar concept with respect to restitution; indeed, under 18 U.S.C. §3664(a) (see 36a), a court is required to consider a defendant's needs before imposing restitution. The decision below threatens every criminal defendant's ability to defend himself, allowing the government to freeze convicted defendants' funds "pending restitution" in almost

every case. This Court should grant certiorari to prevent improper All Writs Act restraining orders in violation of restitution laws and of the Sixth Amendment, and to assure that the government does not become the arbiter of how much of a defendant's own moneys[17] can be used to defend himself.

V. Petitioner Joins In Co-Appellant Williams' Relevant Claims

Finally, petitioner joins in claims to be raised by co-appellant Deborah Williams, including the use of perjured testimony of a drug-addict who lied when claiming to have recalled an examination by Dr. Williams. While not *directly* implicating petitioner, the "smell" of the

[17]This case indeed involves "freezing" defendant's own moneys. The restitution order purported to cover "third-party" payments made as a result of the use of petitioner's provider number in addition to moneys he obtained.

testimony and lumping together of doctors harmed petitioner greatly.

CONCLUSION

This Court should grant *certiorari* to enforce the standard of proof beyond a reasonable doubt, reign in the unprincipled uses of RICO and the All Writs Act, and enforce defendants' Sixth Amendment rights to defend themselves. It should decide whether conscious avoidance instructions are constitutional, and, if so, whether an instruction lacking "balancing language" can stand and whether an evidentiary showing must be made before the instruction can be invoked.

August 18, 1995

Respectfully submitted,

VIVIAN SHEVITZ
19 N. Moger Ave.
Mt. Kisco, N.Y. 10549
(914) 241-1249
Counsel for Petitioner

A P P E N D I C E S

Appendix A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 293, 331, 458, 328, 305, 291—August Term, 1994

(Argued: December 1, 1994 Decided: April 21, 1995)

Docket Nos. 93-1797, -1798, -1799, -1801, -1802, -1895

1995 U.S. App. Lexis 9434

53 F.3d 307

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMSHAID KHAN; CHARLES ADDO YOBO; AUDREY CECILE SADAPHAL; NEPHTALI MONTFORT and PARNELL ST. LOUIS,

Defendants,

MOHAMMED SOHAIL KHAN; JACQUELINE OTERO; DEBORAH WILLIAMS; ROSALY SABA KHALIL; LANCASTER LO and GILBERT ROSS,

Defendants-Appellants.

Before:

FEINBERG, VAN GRAAFEILAND, and MINER,

Circuit Judges.

Appeal from judgments of conviction and sentence entered on November 10 and December 3, 1993 in the United States District Court for the Southern District of New York (Martin, J.) convicting defendants-appellants of (1) conspiring to participate in, and participating in, a racketeering enterprise designed to defraud the New York State Medicaid system, (2) mail fraud, and (3) except as to defendant-appellant Ross, money laundering.

Affirmed in part, reversed in part, and remanded.

KAREN B. SHAER, Assistant United States Attorney, New York, NY (Mary Jo White, United States Attorney for the Southern District of New York, Christopher P. Reynolds, Benjamin E. Rosenberg, Paul G. Gardephe, Assistant United States Attorneys, New York, NY, of counsel) *for Appellee.*

STEPHEN M. GOLDENBERG, New York, NY *for Defendant-Appellant Mohammed Sohail Khan.*

JANE SIMKIN SMITH, Millbrook, NY *for Defendant-Appellant Deborah Williams.*

CAROLYN CORN BICHOUPAN, Carle Place, NY *for Defendant-Appellant Rosaly Saba Khalil.*

SANFORD M. KATZ, New York, NY *for Defendant-Appellant Lancaster Lo.*

VIVIAN SHEVITZ, Mt. Kisco, NY *for Defendant-Appellant Gilbert Ross.*

MINER, *Circuit Judge.*

Defendants-appellants Deborah Williams, Rosaly Saba Khalil, Lancaster Lo and Gilbert Ross appeal from judgments of conviction and sentence entered on November 10, 1993, in the United States District Court for the Southern District of New York (Martin, J.) following a jury trial. Defendant-appellant Mohammed Sohail Khan appeals from a judgment of conviction and sentence entered on December 3, 1993, in the same court, after a plea of guilty.[1] All defendants-appellants were convicted of conspiring to participate in, and participating in, a racketeering enterprise designed to defraud the New York State Medicaid system, in violation of 18 U.S.C. § 1962(c) and (d), and mail fraud, in violation of 18 U.S.C. § 1341, and each defendant-appellant, with the exception of Ross, was convicted of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i).

Williams was sentenced to forty-one months in prison, restitution of $1,814,896 to the State of New York, and forfeiture of $50,000 to the United States. Khalil was sentenced to forty-one months in prison, restitution of $1,931,992, and forfeiture of $90,000. Lo was sentenced to thirty-seven months in prison, restitution of $1,319,000, and forfeiture of $95,000. Ross was sentenced to forty-six months in prison, restitution of

---

[1] Defendant-appellant Jacqueline Otero also pleaded guilty. Before us is a motion by the government for summary affirmance of her conviction and sentence and a motion by her attorney to be relieved of the duty of representation. *See Anders v. California*, 386 U.S. 738 (1967).

$612,855, and forfeiture of $40,000. Khan was sentenced to sixty months in prison and restitution of $8,000,000. Each defendant-appellant also received a term of supervised release and a special assessment.

BACKGROUND

At trial, the government set out to prove that, from February 1990 through June 1991, the defendants and others participated in a racketeering enterprise that defrauded the New York State Medicaid system ("Medicaid") of approximately $8,000,000. Khan was the leader of the enterprise, which operated through four clinics (the "Khan clinics") located at 1153 and 1826 Grand Concourse in the Bronx, and at 461 Lenox Avenue and 2301 Second Avenue in Manhattan, through the Ridgewood Pharmacy at 1153 Grand Concourse in the Bronx, and through two corporations controlled by Khan, Manhasset Diagnostics, Inc., and Manhasset Community Management Services, Inc.

The government presented its case through the testimony of cooperating co-conspirators, including Khan, two physicians who worked at the clinics, Charles Addo-Yobo and Audrey Cecile Sadaphal, two physicians' assistants named Melville Ferns and James Rich, and Carmen Guzman, who was employed as a secretary and, later, as an office manager at one of the clinics. The government also presented the expert testimony of physicians associated with the New York State Department of Social Services ("DSS"), testimony from DSS employees, two of whom posed as patients at the Khan clinics, and the testimony of two actual patients. In addition, the government introduced inculpatory as well as false exculpatory statements made by each of the defendant-

physicians as well as thousands of patient files seized from the Khan clinics and bills sent to Medicaid.

The evidence illustrated the following scheme to defraud: Indigent patients, many of whom were homeless, alcoholic, or drug-addicted, came to the clinics to obtain prescriptions for drugs for which they had no medical need. The patients often would fill the prescriptions at a local pharmacy and then sell the drugs on the street. To obtain the prescriptions, the patients provided the clinics with valid Medicaid recipient numbers, underwent medically unnecessary procedures and tests, and gave blood samples. Physicians' assistants ("PAs"), who performed the vast majority of the patient diagnoses, saw approximately twenty-five to forty patients each weekday at the clinics. The PAs seemed fully aware of the fraud and made no pretense of legitimate treatment. Doctors rarely were on the premises of the clinics.

Medicaid was billed for each patient visit and office test. In addition, each blood sample was sent to Clin Path, a medical laboratory located in New Jersey, which, in turn, billed Medicaid for every blood test. Clin Path "kicked back" twenty-seven percent of its Medicaid receipts to Khan. Khan was the primary organizer of the scheme; he leased the space for the clinics, purchased what limited medical supplies were provided, and hired and paid the PAs. Khan advertised for the physicians by placing advertisements in the New York Times, promising "[v]ery, very good $$." Because only a medical doctor could qualify as a Medicaid provider, Khan could not operate the scheme without the physicians.

The physicians received Medicaid payments for office visits and tests purportedly performed at the clinics. Of these payments, the physicians would "kick back" thirty

to forty percent to Khan. The payments from the physicians eventually were disguised as rent payments. Under this arrangement, each physician entered into a lease agreement with Khan in which the physician agreed to pay Khan $1500 per week rent. This payment did not correspond to the actual rent paid by Khan for the premises.

The Khan clinics were unusual in a number of ways. They lacked substantial medical equipment and were very dirty and unsanitary. In some of the clinics, signs hung from the walls instructing patients not to discuss their prescriptions with one another. The patients consisted mainly of men between the ages of twenty-five and forty-five, in contrast to the diverse patient-mix that might be expected in the urban areas where the clinics were located. Such a mix would include children, women, and elderly persons. There never were any emergencies or hospital referrals, and every patient was a Medicaid recipient. Finally, the clinics had a policy of limiting follow-up visits. This policy was expressed at the 2301 Second Avenue clinic, for example, by a sign stating "no more old patients for tomorrow." While medically indefensible, the policy reduced the number of less-lucrative second visits that the clinics might expect. To accomplish the same purpose, repeat patients often were treated as "first-time" patients at several of the clinics.

The physician-appellants rarely examined any patients themselves;[2] the work was done by the PAs. The PAs would see each patient for only a few minutes. The clinics' records indicated that virtually all of the patient

[2] There was evidence that Williams saw some patients on Saturdays, but she also "supervised" PAs during the week, even though she was not present at the clinics during that time.

complaints were described in one of a very limited number of ways; nearly all of the blood samples taken were analyzed under one of four highly specialized (and expensive) tests; hearing tests were ordered for patients whose charts indicated no hearing problem; EKG tests lacked required interpretation, and some EKG graphs were cut into pieces and distributed among the files of various patients. Charles Addo-Yobo and Audrey Sadaphal, physicians who worked at the clinics, testified that they realized almost immediately that the clinics were not legitimate, and that they were fraudulently billing Medicaid.

Following a three and a half week trial, the jury found Williams, Khalil and Lo guilty of all charges and Ross guilty of all charges except money laundering. The district court imposed sentence upon the four physician-appellants as well as upon Khan, who pleaded guilty. On appeal, Williams, Khalil, Lo, and Ross challenge the sufficiency of the evidence presented at trial and make various claims of error in regard to evidentiary rulings and the jury charge. Further, each defendant challenges portions of his or her sentence and each defendant, with the exception of Khan, challenges the district court's assessment of restitution.

DISCUSSION

I. EVIDENTIARY SUFFICIENCY CLAIMS

The physician-appellants argue that the evidence was insufficient to establish their knowledge of the fraudulent nature of the clinics' operations, and Ross further argues that there was insufficient proof of the existence of a pattern as required under RICO.

In determining whether the evidence was sufficient to convict the defendants, "we must view the evidence in the light most favorable to the government and construe all possible inferences in its favor." *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir. 1986); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The standard is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original). In making this determination, we do not engage in piecemeal review, but rather, we review the evidence as a whole. *United States v. Carson*, 702 F.2d 351, 362 (2d Cir.), *cert. denied*, 462 U.S. 1108 (1983). Moreover, the government may prove membership in a conspiracy by circumstantial evidence alone, *United States v. Miranda-Ortiz*, 926 F.2d 172, 176 (2d Cir.), *cert. denied*, 502 U.S. 928 (1991), and a defendant may be convicted of conspiracy even though he is unaware of all the conspiracy's unlawful aims, as long as he has knowledge of some of those aims, *see United States v. Lanza*, 790 F.2d 1015, 1022-23 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986). Finally, the government can prove knowledge by showing that "the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993).

A. Evidence of Knowledge

1. Williams

Williams argues that the evidence presented at trial was insufficient to prove that she had knowledge of the scheme to defraud Medicaid. We disagree. The leader of the enterprise, Mohammed Sohail Khan, testified that Williams was aware of his relationship with Clin Path

and that she agreed to pay him forty percent of her Medicaid receipts. To this end, Williams entered into a bogus lease agreement under which she agreed to pay Khan $1500 per week for rent. Khan also testified that, in May of 1991, he was notified that he and all the physicians were to be excluded from Medicaid. He said that when he told Williams that he was going to close the clinics because he did not "want to be a front anymore," she volunteered to take over as the "front," with Khan paying her expenses from the money that he received from Clin Path. The clinics remained in operation until July of 1991, when Clin Path lost its certification from Medicaid.

Other co-conspirator evidence inculpating Williams included the testimony of Dr. Sadaphal, who testified that she became concerned when she realized that all the patient charts had remarkably similar diagnoses. When Sadaphal asked Williams about these similarities, Williams "misled" her by claiming that the similarities were representative of the community in which the clinics were located. Also, a patient named Larita Mitchell testified that she gave the receptionist a list of fake ailments and then met with Williams in an examination room. Mitchell said that Williams did not ask her any questions and did not perform a medical exam and, after a short while, Williams simply told Mitchell to "go next door and take blood." After giving blood, Mitchell obtained her prescription and left; she had the prescription filled and sold the drugs on the street.

Williams argues that Mitchell was not credible because she was a crack addict and falsely testified that she recalled meeting Dr. Williams because it was the same day she took her son to the Boy Scouts when there was no Boy Scouts meeting. The government conducted

a painstaking investigation into allegations that Ms. Mitchell's testimony was perjured. The results were inconclusive, but in any event there is no evidence that the government had knowledge of any perjury when it proffered Ms. Mitchell as a witness. Moreover, Ms. Mitchell's credibility was vigorously disputed before the jury. The jury, after hearing this testimony, was permitted to assess the credibility of these witnesses and to draw reasonable inferences. *See Lanza*, 790 F.2d at 1019.

The government also presented expert testimony indicating that the number of similar diagnoses was "statistically not possible." Finally, evidence of the lack of medical supplies at the clinics and of the presence of signs discouraging repeat visits was put before the jury. All this evidence supplied the jury with enough evidence to allow a reasonable juror to conclude beyond a reasonable doubt that Williams knew of the fraud, *see id.*, or that Williams consciously avoided confirming its existence, *see Rodriguez*, 983 F.2d at 458.

2. Khalil

Khalil contends that, because she rarely was at the clinics and took no active role in the medical care given there, the evidence was not sufficient for a jury to find that she had the requisite knowledge of the criminal nature of the scheme. This contention is without merit.

First, Khalil urges this court to discredit Khan's testimony. However, the credibility of witnesses is the province of the jury and we simply cannot replace the jury's credibility determinations with our own. *See United States v. Losada*, 674 F.2d 167, 173 (2d. Cir.), *cert. denied*, 457 U.S. 1125 (1982).

Second, the fact that Khalil rarely was present at the clinics simply highlights the reasonableness of the jury's inference that a physician who received substantial remuneration for doing almost no medical work or supervision is aware of the fraudulent nature of her conduct. Khalil received $138,816 from Medicaid during her seven-month association with the clinic. Furthermore, there was evidence that Khalil made several conflicting statements regarding the amount of time she spent at the clinics doing work and whether she actually treated patients or merely supervised the PAs. The government also presented expert testimony indicating that the medical and blood tests ordered for Khalil's patient's were medically unnecessary. This evidence was sufficient for reasonable jurors to infer knowledge beyond a reasonable doubt..

3. Lo

Lo also argues that there was insufficient proof that he knew of the fraudulent nature of the scheme. Again, we disagree. The evidence showed that Lo was associated with the Khan enterprise from July to December 1990, at which time he was barred from the Medicaid program. During this period, he received over $100,000 for doing essentially no work. In addition, when Medicaid requested an exit conference in which Lo could explain his billings, he failed to appear. As with the other defendants, the government presented expert testimony establishing the facially fraudulent nature of Lo's patient documentation. Finally, there was testimony that, when a PA was diagnosing men with a condition commonly occurring in women, Lo, without seeing any patients, brought this discrepancy to the PA's attention and provided an alternative diagnosis that would allegedly justify the ordered medication.

4. Ross

Ross contends that the evidence was insufficient to establish his knowledge of the clinics' fraudulent nature. His contention also is without merit. Aside from the expert testimony indicating the fraudulent nature of Ross' patients' charts, there was specific evidence of Ross' knowledge. Ross was present at the clinic for approximately three days each week, and therefore had ample opportunity to observe the utterly inadequate facilities. In addition, he met with staff members in the area where signs were posted indicating that only new patients were welcome. Finally, in March of 1991, after a DSS representative had taken custody of twenty of Ross' files, Ross sent a letter to his PA directing that a certain drug be prescribed only when the condition for which it should be prescribed is present. The timing of this letter in connection with the DSS audit is evidence that Ross wrote the letter to cover his tracks. Ross left the clinic shortly after this incident.

Ross also chose to testify at trial. "By taking the stand and offering his own version of events, [the defendant] waives any claim as to the sufficiency of the Government's case considered alone." *United States v. Friedman*, 998 F.2d 53, 57 (2d Cir. 1993)(internal quotations omitted). Ross testified at trial that he had no knowledge of the fraud at the Khan clinic, and the jury obviously rejected this testimony. Under *Friedman*, the jury was entitled to consider Ross' credibility in determining his knowledge.

Moreover, the evidence also was consistent with conscious avoidance. When Ross was informed that all of the patients came in with the same complaints, he did nothing. When the PA suggested to Ross that he speak to

Khan about a nonsensical prohibition on urinalysis, Ross did nothing. This, and the evidence mentioned above, is consistent with awareness of a high probability of the criminal nature of the scheme and the decision to avoid confirming its criminality. *See Rodriguez*, 983 F.2d at 458.

B. Pattern of Racketeering

Ross argues that, because he was at the Khan clinics for no more than nine weeks, his conduct cannot amount to a pattern of racketeering activity. We disagree. To demonstrate "a pattern of racketeering activity" under 18 U.S.C. § 1962(c), the government must prove "relatedness" and "continuity or a threat of continuity." *United States v. Indelicato*, 865 F.2d 1370, 1381 (2d Cir.) (in banc), *cert. denied*, 493 U.S. 811 (1989).

Relatedness can be established by showing that the predicate acts had "the same or similar purposes, results, participants, victims, or methods of commission." *Id.* at 1382 (internal quotations omitted). In this case, all the predicate acts of mail fraud were performed in the same way with the same purpose—to defraud Medicaid. Accordingly, relatedness was clearly established in this case.

In regard to continuity, the Supreme Court has noted that "the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989). The entity, moreover, may be a legitimate business that regularly engages in illicit activity. *See id.* at 243. In light of these principles, it seems clear that there was a "threat of continuity" present here, because the clinics regularly engaged in defrauding Medicaid.

II. EVIDENTIARY CLAIMS

Although several defendants challenge various evidentiary rulings made at trial, only Williams' claim warrants discussion here. Williams argues that the substance of two telephone conversations that she had with DSS representatives, and reports of those calls, were admitted improperly at trial. We find that the district court did not abuse its discretion in receiving this evidence because there was adequate circumstantial evidence to establish its reliability.

The first telephone call involved Virginia Hale, a DSS representative. Hale testified that, on June 26, 1990, DSS received a provider enrollment application from Williams. Williams does not challenge the fact that she signed and submitted the form, which included a telephone number where she could be contacted. Hale placed a call to that number, which turned out to be one of the Khan clinics, and left a message for Williams to call her back. Later that day, Hale received a telephone call from a woman who identified herself as Williams, and who confirmed the address where the Medicaid checks were to be sent and provided information about one of the clinics. The person also stated that she would check with her "partner" to see if the clinic at which she would be working was certified in New York State. Hale made a written record of the conversation.

The second phone call was described by Anna Graham, who worked with Hale at DSS. Graham testified that on June 28, 1990, she received and made a written record of a telephone call from a woman who identified herself as Williams. During the conversation, the woman stated that the clinic would be licensed as a private office, and that she wanted to enroll as an individual provider.

Williams objected to the admission of the testimony, claiming that there was an insufficient foundation to demonstrate that she was the person making the calls. Authentication generally requires "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). While a mere assertion of identity by a person talking on the telephone is not in itself sufficient to authenticate that person's identity, some additional evidence, which "need not fall in[to] any set pattern," may provide the necessary foundation. Fed. R. Evid. 901(b)(6), Advisory Committee notes, example 6. "[S]elf-identification of *the person called* at a place where he reasonably could be expected to be has long been regarded as sufficient" for authentication purposes. *O'Neal v. Morgan*, 637 F.2d 846, 850 (2d Cir. 1980) (emphasis supplied), *cert. denied*, 451 U.S. 972 (1981). On the other hand, self-identification by a person *who makes a call*, alone, is insufficient for authentication purposes, especially where there are other members of a conspiracy who could have made the call. *See United States v. Zane*, 495 F.2d 683, 696-97 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974). In this case, it is alleged that Williams made the telephone call. Hence, the question becomes whether the circumstances adequately established that Williams was more likely than not the caller. We believe that they do.

First, the calls in question were made in response to a call by Hale to a number that Williams had provided. Hale left a message for Williams and received a return telephone call the same day. Usually, people provide telephone numbers where they reasonably believe they can receive a message. *See Noriega v. United States*, 437 F.2d 435, 436 (9th Cir.) (call made by defendant properly authenticated where defendant provided witness

with a number, witness left message for defendant and defendant returned the call), *cert. denied*, 402 U.S. 908 (1971). Hence, the circumstances indicate that Williams believed she would receive messages that were left at that location. Second, during this period, there is no question that Williams was seeking the Medicaid provider number that she eventually received, indicating her strong interest in returning the call. Third, the caller provided Williams' father's address as the address to which Medicaid payments should be sent. These circumstances provide a sufficient basis to admit the telephone calls.

III. THE JURY CHARGE

A. Balancing Language

Williams and Ross argue that the conscious avoidance charge to the jury was fatally flawed because it failed to include balancing language. Because they failed to raise this claim at trial, we review it for plain error. *See United States v. Civelli*, 883 F.2d 191, 194 (2d Cir.), *cert. denied*, 493 U.S. 966 (1989). In *United States v. Feroz*, 848 F.2d 359, 360 (2d Cir. 1988) (per curiam), we said that a "conscious avoidance" charge should indicate to the jury that "knowledge of the existence of a particular fact is established (1) if a person is aware of a high probability of its existence, (2) unless he actually believes that it does not exist." We have cautioned prosecutors in this circuit to "request that the 'high probability' and 'actual belief' language be incorporated into every conscious avoidance charge." *Id.* at 361.

Here, the prosecutor requested that the "actual belief" language be included in the charge, but the trial court failed to comply with the request. The court, however,

did include the "high probability" language in the charge. Moreover, the court explained that "the necessary knowledge cannot be established by a showing that a defendant was careless, negligent, or foolish." While the court failed to give the preferred charge, the charge as given did not constitute plain error "going to the very essence of the case." *See United States v. Bradley*, 812 F.2d 774, 778 (2d Cir.) (internal quotations omitted), *cert. denied*, 484 U.S. 832 (1987).

B. Constructive Amendment

Williams and Ross claim that the jury charge constructively amended the indictment in violation of the Fifth Amendment by changing the nature of the fraud scheme and the RICO enterprise. We disagree. An indictment is constructively amended when the evidence admitted at trial and the jury instructions create a substantial likelihood that the defendant was convicted of an offense not charged in the indictment. *See United States v. Miller*, 471 U.S. 130, 136-40 (1985). Where the evidence or jury instructions narrow an offense that is more broadly contained in the indictment, however, the indictment is not constructively amended in violation of the Fifth Amendment. *Id.* at 136.

Williams argues that the indictment was amended because the scheme alleged in the indictment focused on the prescription of unnecessary drugs to patients who then sold them on the street, whereas the evidence and charge focused on the billing of Medicaid for unnecessary medical procedures. The indictment, however, clearly indicated that the physicians' role in the fraud consisted of fraudulently billing Medicaid and therefore was not constructively amended.

Williams and Ross also argue that the charge amended the indictment because the indictment mentioned Ridgewood Pharmacy, Manhasset Community Management Service, and Manhasset Diagnostic as part of the scheme, whereas the evidence and charge focused on the four clinics. Khan testified that he was affiliated with Ridgewood Pharmacy and that fraudulent prescriptions would be filled there. The two other entities were set up by Khan and received the lease payments from the defendant-physicians. All these entities thus were related to the scheme. Moreover, even if the evidence at trial and the charge to the jury led to the conviction of the physicians solely on the basis of their relationships with the clinics, the conviction would be for a narrower offense than that contained in the indictment. Therefore, the defendants could not have been convicted for offenses that were not charged in the indictment. *See id.*; *see also United States v. Mucciante*, 21 F.3d 1228, 1236 (2d Cir.) (no constructive indictment where "nothing new was added to [the] indictment"), *cert. denied*, 115 S. Ct. 361 (1994).

IV. SENTENCING ISSUES

Defendants raise numerous challenges to their sentences. The district court calculated the loss component of each physician's offense level by determining the fee charges attributed to the respective physician's Medicaid provider number. Beginning with a base offense level of 6, U.S.S.G. § 2F1.1, the court adjusted upward according to the loss incurred by the fraud. The loss amounts and corresponding resultant levels were as follows: Williams, $1,814,896 for an increase to level 18; Khalil, $1,931,992 for an increase to level 18; Lo, $1,319,146 for an increase to level 17; Ross, $776,414 for an increase to level 16. Each physician then received a two-

level enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b)(2)(A), and a two-level enhancement for abuse of a position of trust, *see* U.S.S.G. § 3B1.3. The district court also imposed a two-level enhancement on Ross for obstruction of justice, based on the finding that Ross had perjured himself at trial. *See* U.S.S.G. § 3C1.1. The resultant levels and corresponding guidelines ranges were: Williams, Khalil, and Ross, level 22 (forty-one to fifty-one months), and Lo, level 21 (thirty-seven to forty-six months). Each physician was then sentenced at the bottom of the applicable range.

A. Foreseeability of Loss/Inclusion of Loss

Williams, Khalil, and Ross claim that the district court erred in finding that the reasonably foreseeable losses included all services that were billed to their Medicaid provider number. We disagree. The district court found that no medical care whatsoever was administered at the clinics and that all the billings were fraudulent. Based on the record in this case, the court's findings are not clearly erroneous. *See* 18 U.S.C. § 3742(e).

B. Khan's Challenge to the Upward Departure

Khan argues that the district court erred in departing upward from his guidelines range. This argument is without merit. A sentencing court may impose a sentence outside the guidelines if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines." 18 U.S.C. § 3553(b); *see* U.S.S.G. § 5K2.0. The district court must first determine whether certain factors may warrant a departure, a determination that we review *de novo*, *see United States v. Rogers*, 972

F.2d 489, 492 (2d Cir. 1992). Once it has been established that certain circumstances may warrant a departure, the district court has "wide discretion" in determining whether to depart. *See United States v. Colon*, 905 F.2d 580, 584 (2d Cir. 1990).

Khan's original guidelines range was forty-six to fifty-seven months in prison. The district court then delineated three grounds for imposing an upward departure. First, the court noted that the guidelines failed to adequately account for the enormous health risks posed by the scheme. Second, it noted that this scheme undermined the public's confidence in government systems like Medicaid to the detriment of Medicaid recipients. Third, the court was concerned with Khan's role in inducing doctors to abuse their positions of trust. After upwardly departing to an offense level of thirty-two and a corresponding guidelines range of 121 to 151 months, the court granted the government's request for a downward departure, pursuant to section 5K1.1, and sentenced Khan to sixty months in prison. Each departure will be discussed in turn.

In circumstances where the financial loss "does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted," particularly where "the fraud caused or risked reasonably foreseeable, substantial non-monetary harm." U.S.S.G. § 2F1.1, comment 10(a). Here, the court found that the scheme created a substantial health risk to patients, most of whom were alcoholics or drug addicts, because the clinics administered medical exams and dispensed prescription drugs without regard to the patients' needs. This resulted in uniformly poor medical treatment to a population that sorely needed treatment. These factors clearly warranted a departure.

The effect on Medicaid was also appropriately used as a basis for departure. U.S.S.G. § 5K2.7 identifies "disruption of a governmental function" as a factor that may warrant an upward departure. Here, the district court found that the scheme not only disrupted the government's function of efficiently administering Medicaid, but also undermined the public's confidence in government. These factors were not adequately taken into account by the Sentencing Commission. *See United States v. Flinn*, 987 F.2d 1497, 1499, 1504-05 (10th Cir. 1993). Accordingly, the district court properly considered these factors as grounds for a departure.

The departure based on Khan's role in inducing others to abuse positions of trust also was appropriate. Khan initiated this scheme and put his organizational skills behind it. Although he received an enhancement under section 3B1.1(a) for being the organizer or leader of the scheme, the district court found that the guidelines did not adequately take into account his role in inducing the doctors to breach their positions of trust. We find that this case is not in the heartland of conspiracies to defraud and thus that the court's reliance on this factor as a basis for departure was proper.

In regard to the district court's discretion to depart under the circumstances of this case, we find that the court did not abuse its discretion by departing for each of the three factors discussed above.

C. Consideration of Section 3664 Factors

Williams, Ross, Lo and Khalil argue that the district court abused its discretion by failing to consider the financial resources of the defendants and the needs of the defendants' dependents, as required under 18 U.S.C. § 3664, when imposing restitution. We agree. Section

3663(a) provides that the district court, in sentencing a defendant, may order that the defendant make restitution to any victim of such offense. Section 3664(a) provides that in determining whether to order restitution and its amount, the sentencing court

> shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

"[T]here is no requirement that specific findings be made on each factor," *United States v. Gelb*, 944 F.2d 52, 56 (2d Cir. 1991), and the defendant bears the burden of proof as to these factors, 18 U.S.C. § 3664(d). Nevertheless, "the record must demonstrate that the court has considered these factors in ordering restitution." *United States v. Tortora*, 994 F.2d 79, 81 (2d Cir. 1993).

Here, the amount of restitution ordered by the district court is equivalent to the loss occasioned by each defendant. The record does not indicate whether the court considered the financial resources of the defendants or the financial needs and earning ability of the defendants and their dependents. It appears that the district court simply "identified the amount owed . . . and imposed [the] full amount" on the defendants, and this is an abuse of discretion. *See Tortora*, 994 F.2d at 81. Thus, we must remand for the district court to consider the statutory factors that bear on the issue of restitution. Upon remand, the court may consider the amount of forfeiture each physician-appellant was ordered to pay as well. *See United States v. Porcelli*, 865 F.2d 1352, 1355, 1364-65 (2d Cir.), *cert. denied*, 493 U.S. 810 (1989).

The district court ordered that defendants Williams, Khalil, and Lo make their restitution payments according to a schedule determined by the Probation Department as a special condition of their supervised release. However, we have recently held that the sentencing court cannot "authoriz[e] a probation officer to make post-sentencing decisions as to either the amount of restitution, or the scheduling of installment payments." *United States v. Porter*, 41 F.3d 68, 71 (2d Cir. 1994) (citations omitted). Therefore, the district court must revise its restitution orders to comply with our ruling in *Porter*. The district court also authorized the Probation Department to schedule the payments for Khan's restitution order. Accordingly, we remand that portion of Khan's sentence to allow the court to comply with *Porter*. *See id.*

As to defendant-appellant Jacqueline Otero, we grant only so much of the government's motion for summary affirmance as relates to her conviction and to her sentence in regard to the district court's determination of loss attributable to her and the imposition of a two-point enhancement for more than minimal planning, *see* U.S.S.G. § 2F1.1(b). We deny so much of the government's motion for summary affirmance as relates to the restitution order in which the court authorized the Probation Department to set a schedule of payments. As discussed above, this practice is contrary to our ruling in *Porter*, 41 F.3d at 71, and we therefore remand for the district court to determine her schedule of payments of restitution. We also deny the motion of Otero's attorney to be relieved from representing Otero on this appeal. *See Anders v. California*, 386 U.S. 738 (1967).

We have considered all of the defendants' other arguments as well as their motions in this court and find them to be without merit.

CONCLUSION

For the foregoing reasons, the case is remanded for the district court to consider the section 3664(a) factors on the record regarding the restitution ordered for defendants Williams, Ross, Lo, and Khalil, and to revise the restitution orders regarding the schedule of payments to comply with *Porter*, 41 F.3d at 71. In all other respects the judgments of conviction and sentence are affirmed.

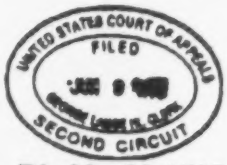
Appendix B

Order of the United States Court of Appeals For the Second Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 Foley Square
New York 10007

GEORGE LANGE III
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 9th day of June on thousand nine hundred and ninety-five.



USA

Appellee ,

v.

Khan Defendant-Appellant Dkt No: 93-1797

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant GILBERT ROSS.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, CLERK
BY: Beth J. Meador

Beth J. Meador Date 6/9/95
Administrative Attorney

p o ccc
inbancdn frm

Appendix C

Pertinent Statutory Provisions

The Mail Fraud Statute, 18 U.S.C. § 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, ... for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, ... or knowingly causes to be delivered by mail ... according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. ...

The RICO Statute, 18 U.S.C.§ 1961 *et seq.* provides in pertinent parts:

Section 1961: Definitions

As used in this chapter --

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section . . . 1341 (relating to mail fraud) . . . .

(4) "enterprise" includes any

individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of ra~keteering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

§ 1962. Prohibited activities

... (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

... (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years ... or both, and shall

forfeit to the United States, irrespective of any provision of State law--

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any--

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a

defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) ....

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section--

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that--

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest posssible time, and prior to the expiration of the temporary order.

. . . .

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper....

. . . .

The All Writs Act, 28 U.S.C. § 1651(a):

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

The Restitution Statutes, 18 U.S.C. §3663-3664:

Section 3663. Order of restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or section 46312, 46502, or 46504 of title 49, may order, in addition to .... any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an

element a scheme, a conspiracy, or a pattern of criminal activity means any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

. . . .

(b) The order may require that such defendant--

(1) in the case of an offense resulting in damage to or loss ... of property of a victim of the offense--

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of--

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing,

less the value (as of the date the property is returned) of any part of the property that is returned;

. . . .

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in--

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than--

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such

order.

In determining whether to revoke probation or a term of supervised release, modify the term or conditions of probation or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced--

(1) by the United States--

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title [18 U.S.C. 3611 et seq.]; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

. . . .

Section 3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of

demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

. . . .